BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MERIDIAN AGGREGATES COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 88-149 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case represents the appeal of a mitigated $1,000 civil penalty No. 88-N155, issued by the Department of Ecology to the appellant, the operator of a quarry in Skagit County, Washington, for allegedly causing siltation and turbidity in Carpenter Creek. The sole issue before the Board deals with jurisdictional time limits set forth in RCW 43.21B.300(2).

The matter came before the Pollution Control Hearings Board, Harold S. Zimmerman, presiding, and Wick Dufford.

The hearing was conducted at Redmond on April 21, 1989. Appellants Meridian Aggregates Company were represented by David J.

Piper, Regional Manager, and Darin Lindsey, Regional Engineer. Respondent State of Washington Department of Ecology appeared by Ann C. Essko, Assistant Attorney General. Kim L. Otis of Gene Barker & Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined and admitted. From testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

On June 21, 1988, the Department of Ecology issued a Notice of Penalty No. DE 88-N155, in the amount of $2,000 following an inspection of Carpenter Creek, by the Departments of Ecology and Fisheries. Meridian Aggregates Company of Mt. Vernon, was alleged to have caused siltation to enter the creek while constructing the settling ponds at the company's quarry.

II

On July 8, 1988, the appellant filed a request for relief from penalty. Department of Ecology issued its Notice of Disposition upon application for relief from Penalty No. 88 N-155 on August 22, 1988, and mitigated the penalty from $2,000 to $1,000. The appellant received the Notice and letter on August 23, 1988.

III

The Notice of Disposition states:

> Any person aggrieved by this penalty may obtain review thereof by application within thirty (30) days of

receipt of this penalty to the Washington State Pollution Control Hearings Board, Mail Stop PY-21, Olympia, WA 98504-8921.

IV

On September 23, 1988, appellant's appeal was received by the Pollution Control Hearings Board. This was thirty-one days after appellant received Ecology's Notice of Disposition.

V

Darin S. Lindsey, Regional Engineer of Meridian, stated that he contacted the Department of Ecology's Redmond, Washington, office to ask if the appeal needed to be received by the Board or just postmarked by the deadline date of September 22, 1988. He said the response was that the postmark by the deadline of September 22, 1988 was adequate.

VI

Neither Nancy Ellison, Redmond Regional Manager, in September 1988, nor Mary Kautz, Enforcement Coordinator, have a record or recollection of conversation with anyone from Meridian about the appeal deadline, although each say such a conversation with someone at the agency could have happened. Both Ellison and Kautz testified that they would not have advised that a postmark on the 30th day was adequate.

VII

We do not doubt the honesty of any of the persons who testified

in this matter. But, notwithstanding that everyone gave his or her best recollection of events, it is apparent that somehow a misunderstanding arose, and Meridian formed the impression that the date of mailing (as opposed to the date of receipt by the Board) establishes the time for filing an appeal.

VIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

Appeals of civil penalties must be filed with the Pollution Control Hearings Board within thirty (30) days after receipt of the notice of penalty by the person penalized. RCW 43.21B.300(2).

II

Under the terms of the Board's rules, the date of filing an appeal is "the date of actual receipt by the Board". WAC 371-08-080. In this case, the Board received the appeal one date too late.

III

This Board has consistently held that the timely filing of a notice of appeal is necessary for it to acquire jurisdiction. E.g., Eckert Overseas Agency v. PSAPCA, PCHB No. 901 (1975); Land Development Sales, Inc. v. DOE, PCHB No. 84-298 (1984).

The question is whether the Board has power to create an

exception to this principle in the interests of fairness in an individual case.

IV

On reflection, we are convinced that the Board is without authority to create such an exception to the time limit for appeals established by the Legislature. Under the case law it is clear that jurisdiction of a statutorily created body cannot be created by estoppel. E.g., State ex rel Pioli v. Higher Education Personnel Board, 16 Wn App 642, 558 P.2d 1364 (1976); Rust v. Western Washington State College, 11 Wn.App. 410, 523 P.2d 404 (1974). See also the recent decision of the Shorelines Hearings Board in Brooks v. Issaquah, SHB No. 89-1 (1989).

V

Moreover, even were the doctrine of estoppel available for this Board to apply in relation to the appeal period, we do not believe the present case would be a proper instance for its application. The doctrine requires detrimental reliance on the act or statement of another which is later repudiated or contradicted. See, e.g., Shafer v. State, 83 Wn.2d 618, 521 P.2d 736 (1974). The reliance must be reasonable.

In the context of dealing with an organization, like a state agency, this means that the act or statement relied upon must be made by an official with the authority to speak for the agency in the

matter at issue. University of Washington Regents v. Seattle, 108 Wn.2d 545, 741 P.2d 11 (1987). Here, the appellant has not established with whom his agent spoke, much less whether the subject was within that person's realm of power.

Equitable estoppel applied against the government is not favored, and every element must be proved with clear, cogent and convincing evidence. Pioneer National Title Insurance Company v. State, 39 Wn App. 758, 695 P.2d 996 (1985). That standard of proof was not met here.

VI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the Conclusions of Law, the Board enters this

ORDER

The Pollution Control Hearings Board does not have subject matter jurisdiction to hear this appeal, therefore, the matter is dismissed.

POLLUTION CONTROL HEARINGS BAORD

HAROLD S. ZIMMERMAN, Presiding

WICK DUFFORD, Chairman

Issued May 19, 1989.